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IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

WRIT PETITION NO. 1029 OF 2007

Gharda Chemicals Limited, an Indian Company incorporated under the Companies Act, 1956, having its registered office at 5/6, Jer Mansion, W.P. Varde Marg, Bandra (W), Mumbai 400 050. ... Petitioner'

Versus

1. The Union of India, Through the Secretary, Ministry of Commerce and Industry, Udyog Bhavan, New Delhi 110 001 and also at 2nd Floor, Ayakar Bhuvan, M.k. Road, Mumbai 400 020.

2. The Controller General of Patents, Designs and Trade Marks having his office at Boudhik Sampada Bhavan, Near Antop Hill Post Office, Antop Hills, Mumbai 400 037.

3. The Asst. Controller of Patents and Designs, having his office at Boudhik Sampada Bhavan, Near Antop Hill Post Office, Antop Hill, Mumbai 400 037.

4. United Phosphorous Limited, 11th Road, C.D. Marg, Khar (West), Mumbai 400 052. ... Respondents

Mr. S.K. Sen with Mr. Amit Jamsandekar i/by R.A.K. Najama-Es-Sami for Petitioner.

Dr.(Mrs) Poornima Advani with Mr. G.Hariharan for R.Nos. 1 to 3.

Mr. D.D. Madan, Sr. Counsel with Mr.M.A. Mahadgut for R. No. 4.

CORAM: F.I. REBELLO & J.P. DEVADHAR, JJ.
DATED: 26TH SEPTEMBER, 2007

ORAL JUDGMENT (Per F.I. Rebello,J.):

. Rule. Heard forthwith.

. The Petitioner company incorporated under the Companies Act, challenges the order of Respondent No. 3 dated 25th January, 2007 whereby the Respondent No. 3 ordered (a) dismissal/rejection of the Pre-Grant Opposition filed by the Petitioner and (b) grant of patent to Respondent No. 4. It is the grievance of the Petitioner that the said order was passed in complete disregard of statutory provisions and principles of natural justice inasmuch as the order was passed without affording the Petitioner a proper hearing and without any consideration or deliberation of the serious contentions raised by the Petitioner during and after the pre-grant opposition hearing conducted by Respondent No. 3.

. According to Petitioner on 15.4.2005, the Respondent No. 2, The Controller General of Patents, Designs and Trade Marks granted process patent to Respondent No. 4 being Patent No. 194225 dated 6th January, 2003 and titled "A Process for Preparing a Chemically Stable Synergistic Herbicidal Composition".

2. On 14th February, 2006 the Petitioner filed an application under Section 9(4) of the Insecticides Act, 1968 for permission to manufacture and sell a

herbicidal product containing Metusulfurn Methyl 5% + Sulfosulfuron 75% WG. The Petitioner was entitled under the said Insecticide Act to make the said 9(4) application, also generally known as a "Me Too" application, on the basis of Respondent No. 4 having already secured an insecticide registration, vide a 9(3) application to manufacture and sell the herbicide product containing Metsulfuron Methyl 5% + Sulfosulfuron 75% WG. On 22nd March, 2006, the Petitioner received a notice from Respondent No. 4 claiming, inter alia that they have been granted a process patent for the herbicidal composition containing Metsulfuron Methyl + Sulfosulfuron. The said notice also suggested that the Petitioner should consequently withdraw their said 9(4) application, since sustaining the same would amount to an infringement of Respondent No. 4’s patent rights.

. Being aggrieved by the said notice, the Petitioner made representations before the concerned department, following which the Registration Committee under the Insecticide Act concluded, at their meeting held on 21st December, 2006 that "the product and the process registered under Section (3) under the Insecticides Act, 1968 are not found patented. The Registration Committee has consequently decided to grant registration to all complete applications of the product Sulfosulfuron 75% and Metsulfuron Methyl 5%

WG, made under section 9(4) of the Insecticides Act, 1968

3. According to Petitioner, to verify the assertions of patent rights made by Respondent No. 4, at Exhibit C, the Petitioner carried out an inspection of records at the Patent Office, during which it became aware of a patent application made by Respondent No. 4 (being application No. 15/MUM/2003), and the same having been published by Respondent No. 2 in the Patent Office Journal dated October 2, 2004 and since the said application was not opposed, a process patent, bearing number 194225, in respect of "A Process For Preparing a Chemically Stable Synergistic Herbicidal Composition" was issued on the 15th April, 2005 favouring Respondent No. 4. According to Petitioner, at or around the same time, the Petitioner also became aware of Respondent No.2’s intention to grant another patent to Respondent No. 4 in respect of a product patent application titled "A Chemically Stable Synergistic Herbicidal Composition" (being Application No.664/MUM/2004 Dated 18th June, 2004). The said application was published by Respondent No. 2 in the Patent Office Journal dated 12.08.2005. The Petitioner on or about 5th of June, 2006 filed with Respondent No. 2 a Pre-Grant Opposition representation as provided under Section 25(1) of the Patents Act, 1970. According to the

Petitioner, there are several reasons why the Respondent No. 4 is not entitled to the Patent.

4. Respondent No. 2 set the Pre-Grant Opposition for a hearing on the 17th of January, 2007. On the morning of 17th of January, 2007 the Petitioner filed a Revocation Petition before this Hon'ble Court (being Miscellaneous Petition No. 17 of 2007 dated 17th January, 2007), praying therein that Respondent No. 4's patent No. 194225 be revoked on the grounds as provided for under section 64 of the Patents Act, 1970. The said Petition is pending. According to Petitioner, on the appointed date of hearing as aforestated, the Petitioner (the Opponent in the said Pre-grant Opposition) and Respondent No. 4 (the application in respect of patent application No. 664/MUM/2004) appeared before Respondent No. 3 who was appointed by Respondent No. 2 to conduct the Pre-Grant opposition hearing. The Petitioner states that the Petitioner was unable to put forward/advance all their submissions before Respondent No. 3 because the Respondent No. 3 truncated the proceedings owing to other pressing appointments and meetings. During the course of the curtailed hearing, the Petitioner raised numerous objections as regards the procedure and legality of certain actions of Respondent No. 2 and 3. The objections raised by the Petitioner during the course of the hearing have

been set out. The objections it is submitted were over ruled on the ground that the Patent Rules have been modified and that the Applicant for a patent grant i.e. Respondent No. 4 was entitled to be invited, be present and to participate in the Pre-Grant Opposition hearing. It is their contention that during the course of the Petitioners submissions, the Respondent No. 3 abruptly asked the Petitioner's expert to bring to a close his submissions and proceeded to request Respondent No. 4 to put forward their submissions. The Petitioner's immediately objected at not being allowed to complete their submissions, but were overruled by Respondent No. 4 on the ground that he had only limited time for the hearing since he was required to attend other pressing meetings and had other appointments. It is not necessary to set out other averments except the averment that according to Petitioner Respondent No. 3 commenced reading from/referring to submissions made in a reply statement" filed by Respondent No. 4 with Respondent No . 2. The said reply statement was filed in reply to the Petitioner's pre-grant opposition representation. The Petitioner raised various objections including that the said reply statement had not been served upon the Petitioner and consequently the Petitioner was not in a position to refer to the same nor had any opportunity to offer rejoinder. The respondent No. 3 according to

Petitioner over ruled the Petitioner’s objections and observed (i) that the Respondent No. 4 was entitled to file their reply statement under the amended provisions of the Patent Rules, 2003 and (ii) that the said amended Patent Rules do not require the Respondent No. 4’s Reply Statement to be served upon the Petitioner. According to Petitioner Respondent No. 3 soon thereafter interrupted the submissions being made by Respondent No. 4 and suggested that the hearing be continued the following day. Respondent No. 4 expressed their inability to be present the next day and soon thereafter Respondent No. 3 concluded the proceedings without affording the Petitioner any opportunity to make a rejoinder to the submissions made by respondent No. 4. Various other steps taken have been set out.

5. At the hearing of this petition, the major contention which has been urged and advanced is that once the Respondent No. 4 had filed reply to the Pre-Grant Opposition filed by the Petitioner, the said reply ought to have been made available to the Petitioner to enable the Petitioner to file their objections. This having not been done, the order suffers from the violation of the principles of natural justice and fair play and consequently the order has to be set aside and the matter remanded back to the tribunal for de novo consideration and

passing a fresh order after giving an effective opportunity to the petitioner. Submissions have also been made to the denial of fair opportunity during the course of the hearing.

. A reply has been filed on behalf of Respondent Nos. 1 to 3. It is firstly contended that the Petition is not maintainable as the controller of Patents and Designs has rejected the representation of the Petitioner objecting to the grant of patent on published Patent application of Respondent No. 4. The pregrant opposition by way of representation proceedings are contemplated as per Section 25(1) of the Patents Act, 1970 (as amended). As per Rule 55 of the Patens Rule, 2003 (as amended), the Pre-Grant opposition by way of representation of the petitioner was rejected by following the procedure laid down therein and thereafter granted the Patent to Respondent No. 4 vide Rule 55(6). On such intimation being served, the Petitioner has to make post grant opposition as per Section 25(2) within one year from the date of publication of grant of the patent under section 43(2) and the same will be dealt with in accordance with Rules 55A to 62. It is contended that in view of the statutory provisions the petition filed by the Petitioner seeking intervention of the Hon’ble Court under Article 226 of the Constitution of India is premature and not

maintainable.

. On behalf of Respondent No. 4, reply has been filed by Roma Das, Manager- ITR and Legal and Constituted Attorney of Respondent No. 4. It was firstly urged that considering Section 116(2) of the Patents Act, 1970, the Petition would not be maintainable as an appeal would lie. This objection was thereafter dropped by the learned counsel considering that there is no appeal available against a Pre Grant Order. Various other legal objections have been made on merit. IT is set out that the present application as well as the prior application against the said Patent No. 194225 are ill motivated and is a futile attempt to obtain the licence to manufacture and sell the agri chemical to derive illegal and wrongful from the product of the Respondent No. 4 which is highly effective and is much in demand. The Respondent had made an application for product patent under the provisions of the Patents Act. The application was made under Section 16 of the Act by dividing out the claims relating to product from the parent application being numbered 61/MUM/WTO/2004 which contained both product and process Patent. Pursuant to the division of the application, the present application was in the mail box while the parent application was duly examined and granted patent and is valid and subsisting under

Patents No. 194225. It is contended that the Petitioner took no steps for opposing the said parent Patent application No. 15/MUM/2003 although the same was duly notified. The contention of the Petitioner that he was not given opportunity has been denied. With reference to the contention that the petitioner was not given copy of the reply filed by Respondent No. 4, in Para 30 it set out that the Respondent No. 2 was right in not serving the Petitioner the Reply statement filed by the Respondent as the law does not cast any such obligation on the Controller. Moreover, the Opponent does not have any statutory right to file any Rejoinder or Reply to the Reply Statement of the applicant.

6. Considering the above pleadings the question is whether the order passed by Respondent No. 3 suffers from procedural infirmity, by not making available to the Petitioner the reply filed by Respondent No. 4 and further whether the petitioner was denied fair opportunity of making out his case and consequently the impugned order is liable to be set aside.

. We may consider the provisions pertaining to hearing an application opposing Pre-Grant. Under section 25(1) of the Patents Act, 1970, which hereinafter shall be referred to as "the Act" any person can file by way of Opposition to the

Controller against the grant of Patent on the grounds 25(1)(a) to (k) as set out therein and on no other ground. Apart from the Controller if requested by such person for being heard, then hear him and dispose of such representation in such manner and within such period as may be prescribed. The next relevant provision is Section 77. Section 77 sets out subject to any rules made in this behalf, the Controller in any proceedings before him under the Act shall have the powers of a Civil Court while trying a suit under the Code of Civil Procedure, 1908 (5 of 1908), in respect of the various matters set out therein.

. Rules have also been framed which are known as Patent Rules, 2003. Rule 55(1) provide that the representation for opposition under sub section (1) of Section 25 shall be filed at the appropriate office and shall include a statement and evidence, if any, in support of the representation and a request for hearing if so desired. Under sub rule (4) of Rule 55, on receiving the notice under sub rule (3), the applicant shall, if so desires, file their statement and evidence, if any, in support of their application within three months from the date of the notice. It is then set out that on consideration of the statement and evidence filed by the applicant, the Controller may either refuse to grant a patent on

the application or require the complete specification to be amended to his satisfaction before the patent is granted. Then there are various other rules setting out the procedure. We need not consider the same or as to whether they apply to the PreGrant or post grant considering the narrow controversy that is before us.

. The statement of Objections and Reasons, in so far as Clause 23 is concerned, which seeks to substitute sections 25 and 26 of the Act, the relevant part of the clause reads as under :

> "Sub Section (i) of the proposed new section 25 seeks to provide for making representation by way of opposition by and person before the Controller before the grant of patent on the ground of patentability including novelty, inventive step and industrial applicability and also on the grounds of non-disclosure or wrongful mentioning in complete specification, source and geographical origin of biological material used in the invention and anticipation of invention by the knowledge, oral or otherwise available within any local or indigenous community in India or elsewhere and also for prescribing the procedure to deal with such opposition.

7. Considering Section 25 read with Section 77 and the rules, more specifically Rule 55, was Respondent No. 3 right in rejecting the request of the Petitioner that the objections filed by Respondent No. 4 should be made available to them in order to meet the said contentions. In our opinion, the law pertaining to procedure for hearing is now well settled. In an enquiry which has the effect of civil consequences, the party whose rights are likely to be affected must be in a position to effectively put up their case. That would include an opportunity of being heard apart from knowing which material is being used against them. Once an Opposition to grant of Patent is filed and the applicant files a reply to the opposition application, the principles of natural justice would require, even if not provided by the rules, in the absence of any express statutory exclusion, that the copy be made available. If therefore, the pleadings or other material relied upon are not given, it would tantamount to violation of the principles of natural justice and fair play. If there be pleadings or material which require to be considered in support of the opposition, then an opportunity to file a rejoinder and place additional material to answer the material produced should be granted.

. In the instant case, in our opinion, without going into the issue as to whether the petitioners were granted sufficient opportunity of putting forward their arguments, once the respondent No. 4 had submitted their reply, the respondent No. 3 was bound to make available the same to the Petitioner so as to enable them to meet the objections raised by respondent No. 4, to the pregrant Opposition. Once there was a demand, on failure to make available the reply and material would amount to violation of the principles of natural justice and fair play. Also considering that in the proceedings the Controller has power to take in evidence, considering section 77 of the Patent Act, if the circumstances of the case so warrant, the impugned order in our opinion is liable to be quashed and set aside and the matter is remanded back to Respondent No. 3 for disposal afresh according to law. We make it clear for the order being passed, we are not considering the issue as to the scope and applicability of the provisions of Section 77 to an application in opposition for a pre-grant application for patent. In the light of that the following order :

. Rule made absolute in terms of Prayer Clause (a) and (b). There shall be no order as to costs.

. Considering the controversy, Respondent No. 3 to

dispose of the application in opposition within a reasonable time.

(J.P. DEVADHAR, J.) **(F.I.REBELLO, J.)**